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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF PETITIONER

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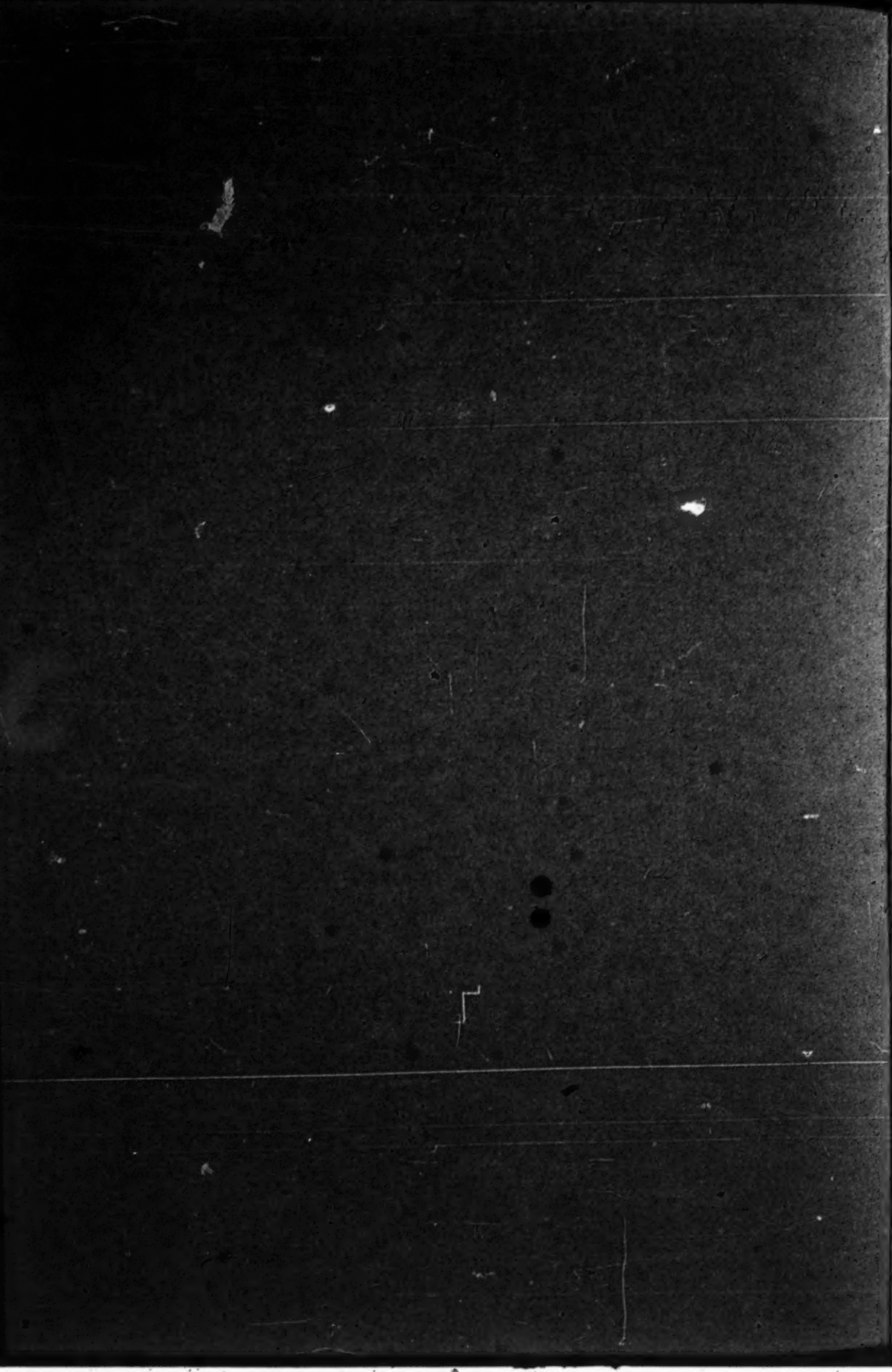

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IN THE

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No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF PETITIONER

Petitioner, William Rabe, prays that, upon review and hearing, the judgment entered herein by the Supreme Court of the State of Washington on May 6, 1971, be reversed.

OPINIONS BELOW

The following opinions and decisions of the courts of the State of Washington are set forth in the Joint Appendix hereto:

1. Order Denying Motion to Suppress, Justice Court, Richland Precinct, September 27, 1968 (A. 12).

2. Decision, Justice Court, Richland Precinct, October 7, 1968 (A. 16).

3. Findings of Fact, Conclusions of Law, and Judgment, Superior Court of the State of Washington for Benton County, September 22, 1969 (A. 71, 73).

4. Opinion of the Supreme Court of the State of Washington, reported at Volume 79, Washington Reports 2nd, page 254, 484 P.2d 917, May 6, 1971, (A. 79).

JURISDICTION

The judgment of the Supreme Court of the State of Washington following appeal from petitioner's conviction was entered on May 6, 1971. On July 28, 1971, this Court entered an order extending the time within which to petition for certiorari to and including August 18, 1971. The petition for a writ of certiorari was filed on August 18, 1971, and was granted on October 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of the State of Washington, 1961, Ch. 146, § 1, codified as § 9.68.010, page 153, Title A, Revised Code of Washington Annotated:

9.68.010 *Obscene literature, shows, etc.* Every person who—

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

QUESTIONS PRESENTED

The questions presented for review, as set forth in the petition for certiorari, are as follows:

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner, the manager of a drive-in theatre, of criminal violation of a general obscenity statute for exhibiting "Carmen Baby," a motion picture which is not obscene under the standards established by this Court, on the rationale that the picture contains erotic scenes which might be viewed unwittingly and out of context by persons having a view of the screen from nearby houses or passing automobiles.

2. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner of a crime for showing a non-obscene motion picture containing allegedly offensive scenes on a drive-in screen visible from nearby houses and roads, on the rationale of protecting privacy, where the statute relied upon pro-

hibited only the dissemination of obscene materials, the state had not enacted a statute of the "offensive display" type or any other law giving petitioner notice of the conduct sought to be punished, no one had complained about the film, and there was no evidence that anyone in nearby houses or passing cars had in fact seen it on the screen.

3. Whether the First and Fourteenth Amendments permit the seizure of a motion picture, incident to an exhibitor's arrest on an obscenity charge, where the arrest warrant was issued solely on the testimony of a police officer who had seen most but not all of the film from a distance without hearing any of the sound track, the testimony described individual scenes in the picture, nothing was received in evidence on the film's dialogue or plot, and the magistrate held no adversary hearing on the question of alleged obscenity.

STATEMENT OF THE CASE

1. The Motion Picture Involved

This case arises from petitioner's criminal conviction following the showing of a motion picture entitled "Carmen Baby" at a drive-in theatre of which he was manager.

The film is a dramatic story based upon the libretto of Bizet's opera "Carmen," which in turn was based upon a novel by Merimee (Tr. 111, 132). It tells of an upright police officer who is corrupted and ultimately destroyed by his passion for a prostitute (Tr. 89, 93, 104, 119). The film contains erotic scenes, but sexual consummation is suggested rather than shown (Tr. 88, 122), and the scenes are an integral part of the story and the theme of moral decline and fall (Tr. 89, 108, 115, 120).

Prior to the events here in question, "Carmen Baby"

was reviewed in the *New York Times* and was exhibited in various parts of the United States (Tr. 133-34, 76, 84). One witness had seen it playing at Oak Ridge, Tennessee, on an outdoor screen visible from a motel which had arranged to have the sound track of the motion picture piped into the rooms for those who wished to watch it (Tr. 84). In two states, Rhode Island and New Jersey, "Carmen Baby" had been tested in the courts and found to be non-obscene and protected under the free speech guaranty of the First and Fourteenth Amendments. Transcripts of these two unreported state trial court decisions[1] were filed by petitioner in the Superior Court below, and are reproduced in the Joint Appendix hereto (A. 33, 37). In one of them, Judge Matthews of the New Jersey court gave a concise and engaging summary of the film's contents (A. 51-60), concluding:

> "We have imposed upon us by the Supreme Court of the United States a standard to judge obscenity. I don't have too much difficulty with it. . . .
>
> • • •
>
> "When I look at this film and I look at this test, whether the elements coalesce or not, it seems to me, one, that the dominant theme of this movie taken as a whole is not to a person of average intelligence merely one to appeal to the prurient interest of the members of society. It can. But there are individuals who can get awfully excited at a pencil. There are people who collect shoes, because they get sexual satisfaction from it.
>
> "What we are talking about is the 'normal' member of society.
>
> "Secondly, is the material patently offensive because it affronts contemporary community standards relating

1. *Scuncio v. Columbus Theatre, Inc.*, C.A. 67-4565, R.I. Superior Ct.; *Van Curler Broadcasting Corp. v. Musto*, Superior Ct. of N.J., Hudson County.

to the description or representation of sexual matters? I am sure that no one would go to that picture or no one will learn anything new. There is nothing in that picture that actually portrays the sexual act. You must infer it. The only genitals that are seen are those of a male, and they're on a statue, and you can see those in the Vatican, Judge Drewen.

"And the third test is whether it's utterly without redeeming social value. My reaction to the picture was the utter horror that an individual, a human being, a creature, could have sunk to such baseness without the suggestion that there was something wrong mentally; *and, of course, this was a work of art. It wasn't life. And while it tried to portray life, the way this artist saw life, was through this woman, in this kind of a situation.*

"The picture is not obscene, within the legal sense. . . ." (A. 57-59; emphasis added)

In the State of Washington, the motion picture was exhibited in Seattle, and in a three-week engagement at a drive-in theatre in Yakima (Tr. 76). It was then booked into the Park Y Drive-in Theatre at Richland, another town in Eastern Washington (Tr. 76). Petitioner was the manager of the latter theatre (Tr. 74).

2. Justice Court Proceedings

"Carmen Baby" opened at the theatre in Richland on August 25, 1968. On August 30, 1968, a sergeant of the Richland Police Department signed a criminal complaint and appeared before a justice of the peace seeking a "John Doe warrant" to arrest either the manager or projectionist (A. 8). The police sergeant testified that he had seen most of the film on the nights of August 28 and 29, and described two scenes, one which he characterized as "lewd" and another which he described in answer to the magistrate's inquiry as to whether there were "other scenes

of unnatural emotions" (A. 9). He gave no testimony as to the film's thematic content. Indeed, he could not do so, since he had never heard the sound track but only watched the picture from a distance (Tr. 17, 18-19).

The magistrate conducted no adversary hearing and received no other evidence. On the basis of the police sergeant's testimony, he issued a warrant for the arrest of "John Doe" (A. 10). The police then went to the theatre, seized the film, and arrested petitioner (Tr. 15-16).

A trial was held in Justice Court on the charge that petitioner had violated RCW 9.68.010, the Washington obscenity statute. Before trial, petitioner moved to suppress the film as evidence on the ground that it had been seized in violation of the First and Fourteenth Amendments (A. 11). The justice of the peace denied this motion, rendering a written decision (A. 12). Following trial, the justice of the peace found petitioner guilty on October 7, 1968, and sentenced him to pay a fine (A. 16).

3. Superior Court Proceedings

Petitioner appealed his Justice Court conviction to the Superior Court for Benton County, the state court of general trial jurisdiction (A. 29). In that court he renewed his motion to suppress, which was again denied (A. 30, 31).

In Superior Court the case was tried *de novo* commencing April 2, 1969, to the judge sitting without a jury. The prosecution called six witnesses who rendered opinions on the quality of the film, as follows:

(a) A speech and drama instructor at Columbia Basin College testified that in his opinion the dominant theme of the picture was an appeal to prurient interest, and that

it had no redeeming social value, but conceded that he could not say whether it offended contemporary community standards in its portrayal of sex (Tr. 30, 35, 36).

(b) The local vice president of Atlantic-Richfield Company—who, like the other non-experts called by the state, answered opinion questions couched in conclusory language by the prosecutor—testified that in his opinion the predominant theme of the film was an appeal to prurient interest, that it was patently offensive in affronting contemporary community standards, and that it had no redeeming social value (Tr. 39-41). Cross-examination revealed that in the preceding two years he had seen only three motion pictures—a Billy Graham film, "The Sound of Music," and "Doctor Zhivago"—and that he had avoided "The Graduate" because in his opinion "it is not good for me, and I guess, therefore, others, to see things like this" (Tr. 42-43).

(c) An insurance agent gave the same conclusory answers to the prosecutor on the three-part obscenity test (Tr. 44-45). But on cross-examination he was unable to give any definition for the word "prurient" (Tr. 46), and testified that he based his definition of community standards "on my own moral standards more than anything" (Tr. 46).

(d) The manager of a foods processing plant, a member of the school board, gave the same set of conclusory answers on the obscenity elements (Tr. 49-50). Cross-examination brought out that he was simply equating his personal moral feelings with community standards, and had testified in terms of the former (Tr. 50-51, 53).

(e) A farmer gave the same set of conclusory answers, but admitted that he was not familiar with current motion

pictures, having only seen two in the past five years, and was testifying on the basis of his "personal feeling" (Tr. 56-58).

(f) A psychologist expressed similar conclusions in applying the three-part test for obscenity, although his answer as to community standards was largely unresponsive (Tr. 62-63). He added an opinion that "nudity was underplayed" in the film, which might result in an appeal to "latent homosexuality" (Tr. 63-4). This witness thought that *all* motion pictures are a damaging influence and had seen none in the last five years except some westerns and a James Bond movie (Tr. 66, 69).

Six witnesses testified on petitioner's behalf that the predominant theme of the film was a dramatic story with a moral message (variously interpreted), that it did not offend contemporary community standards, and that it possessed redeeming social value:

(a) A radiological engineer, formerly a professional photographer, chairman of the local Children's Home Society, described other films of equal candor being shown routinely in the vicinity, and praised the photography and theme of "Carmen Baby" (Tr. 84-97).

(b) A woman administrative assistant at the Atomic Energy Commission, chairman of the Library Board for the City of Richland, testified that the picture's theme was "[t]he degradation or almost annihilation of a personality as a result of his obsession for a woman," and that the erotic scenes were necessary to the story (Tr. 103-8).

(c) A mother of four children with a degree in English literature found the "characters interesting" and the opening scene "a beautiful thing" (Tr. 110-115).

(d) A Ph.D in physics saw the film as "a classic tragedy on the Greek model" (Tr. 117-122).

(e) A systems analyst, who sees 75 to 100 motion pictures per year, described this one as "artistic in nature" and as telling "a story that has some value . . ." (Tr. 124-129).

(f) The chairman of the language arts department at Columbia Basin College listed parallels between the film and the opera "Carmen" (Tr. 131-138).

The police sergeant who had signed the criminal complaint testified that the drive-in theatre screen was visible from a nearby highway, and that on both nights that he sat outside the theatre in his car he had seen teenagers and younger children watching the film through a wire fence which surrounded most of the premises (Tr. 17, 20-21).

Petitioner testified that as theatre manager he had been occupied running the concession stand and the ticket office every night, and had never seen the film at the time of his arrest, although he had heard comments about it (Tr. 74-82). This testimony was uncontradicted.

At the close of the evidence and following argument the Superior Court judge rendered an oral opinion stating, in effect, that he would find petitioner guilty without finding the film to be obscene in the constitutional sense. He stated:

> "The point I am making is that I don't believe that it is necessary for this court to reach the issue of whether the picture taken as a whole is obscene. I think this court under these peculiar circumstances must consider each portion of the picture as viewed by, I suppose, all of the families in the residential area, all of the people driving over the overpass, as

short scenes, individual portions of the movie, and in looking at it on that basis I agree with Justice Bowman.

"Who can say that this is not obscene? In that light there is no plot, nothing. Just an offensive demonstration displayed to families passing in the night." (A. 68-69).

On April 24, 1969, the judge allowed the prosecution, over petitioner's objection, to reopen to present the testimony of an additional police officer (Tr. 151-53, 155). The officer testified that approximately twelve to fifteen residences in the area have a view of the screen at the drive-in theatre (Tr. 163).

Six months later, on September 22, 1969, the Superior Court entered its written findings and conclusions, including most significantly Conclusion of Law II:

"Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves." (A. 71-72).

The court made no findings as to whether petitioner had known the contents of the film, or whether the film as a whole was obscene within the meaning of that term as defined by this Court (A. 71-72). A judgment of "guilty of the crime of obscenity" was entered, and petitioner was sentenced to pay a fine of six hundred dollars (A. 73).

4. State Supreme Court Proceedings

Petitioner appealed his conviction to the Supreme Court of the State of Washington, which received briefs and heard argument *en banc*. On May 6, 1971, the court filed its opinion affirming the conviction (A. 79-103). Rejecting petitioner's arguments both on the seizure point and on the merits, the court held that the film "probably would

pass the definitional obscenity test" of *Roth v. United States*, 354 U.S. 476 (1957), but that the "context of its exhibition" made it obscene in this instance (A. 90). While apparently conceding that neither the presence of juveniles outside the fence nor the possible glimpses by passing motorists could support a conviction, the majority concluded that the exhibition of "lewd and offensive films" visible from houses would violate the residents' "individual privacy" contrary to RCW 9.68.010, the obscenity statute (A. 96).

The sentence imposed upon petitioner has not yet been executed.

SUMMARY OF ARGUMENT

1. The film here at issue is non-obscene and constitutionally protected. In wielding its obscenity statute to punish the dissemination of a protected work, the Washington court has misread this Court's decision in *Redrup v. New York*, 386 U.S. 767 (1967). Even if a state may regulate the content of public displays visible to unwilling passers-by, it may do so only by enacting a specific statute clearly defining the proscribed conduct. The opinion below erroneously rejects the definition of obscenity established in *Roth v. United States*, 354 U.S. 476 (1957), while imposing criminal penalties on the vague ground that isolated portions of the film are considered "offensive." Petitioner's conviction subjects protected speech to overbroad and unpredictable restraints, contrary to the First and Fourteenth Amendments.

2. Washington had not adopted any statute dealing with allegedly obtrusive displays, nor had its courts even recognized a common law right of privacy. Nothing in the

statute or elsewhere gave petitioner notice that he could be prosecuted for exhibiting a non-obscene film on an outdoor screen visible from afar. His conviction under an unforseeable, *ex post facto* judicial expansion of the precise language of the obscenity statute deprives him of due process of law. *Bouie v. Columbia*, 378 U.S. 347 (1964). Moreover, the State offered no proof that any substantial invasion of privacy had in fact occurred. See *Redrup, supra*, 386 U.S. at 769; *Cohen v. California*, 403 U.S. 15 (1971). There was thus no proof that petitioner committed any offense, even had there been a statute defining one.

3. The State's seizure of the motion picture film, without a prior adversary hearing on the question of alleged obscenity, violated the First and Fourteenth Amendments. In issuing an arrest warrant on the sole basis of testimony by a police officer who had seen less than all of the film, and heard none of the sound, the magistrate failed to conduct the searching inquiry required by *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961). Only a pre-seizure adversary hearing can provide the necessary safeguards against extended de facto censorship by seizure incident to criminal prosecution.

ARGUMENT

I. THE STATE'S USE OF A GENERAL OBSCENITY STATUTE TO PUNISH PETITIONER CRIMINALLY FOR HAVING EXHIBITED A NON-OBSCENE MOTION PICTURE, ON THE RATIONALE THAT INDIVIDUAL SCENES IN THE FILM MIGHT OFFEND OR INVADE THE PRIVACY OF PERSONS IN NEARBY HOUSES, SUBJECTS PROTECTED SPEECH TO OVERBROAD, VAGUE, AND UNPREDICTABLE RESTRAINTS, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS.

While the Washington Supreme Court has conceded only that "Carmen Baby" "probably" would pass the definitional obscenity test, the record makes unmistakably clear that it would. The six witnesses to the film's contents called by petitioner in the trial court—a representative group of citizens experienced in films and literature—explained in convincing terms why they found it meritorious (Tr. 84-138). The State offered no substantial evidence that the material offended national standards, as opposed to personal tastes.[2] The film has a predominant dramatic theme, possesses genuine social value, and is well within the prevailing community standards of candor. Thus it is constitutionally protected under the standards carefully developed in *Roth v. United States*, 354 U.S. 476 (1957), *A Book v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), and other cases.[3]

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2. The prosecution must prove that the material violates *national* standards of obscenity. *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

3. It is manifest that "Carmen Baby" is superior to much other material within the broad scope of First Amendment protection. See, e.g., the holdings in *Burgin v. South Carolina*, No. 70-122, 40 U.S. L. Week 3160 (October 12, 1971) (four magazines); *Ratner v. California*, 388 U.S. 442 (1967) (per curiam) ("Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam) (various films); *Schackman v. California*, 388 U.S. 454 (1967) (per curiam) (various films); *I.M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam) ("Artist's

It is axiomatic that attempts to punish non-obscene materials under general obscenity statutes are unconstitutional under the freedom of speech guaranty of the First and Fourteenth Amendments. *E.g.*, *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Here, Washington attempts to escape that principle on the rationale that the film was exhibited in a fashion which invaded privacy. In doing so it relies upon this Court's *per curiam* opinion in *Redrup v. New York*, 386 U.S. 767 (1967), where the Court observed in reversing three convictions:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. Alexandria, 341 U.S. 622; Public Utilities Comm'n v. Pollak, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463." *Id.*, 386 U.S. at 769.

The Washington court has construed the foregoing language to mean that an *obscenity* statute—not a privacy-protection statute—can be wielded to punish the exhibition of non-obscene materials where supposed privacy interests are at stake. Such an application of the law would seriously inhibit expression and invest prosecuting authori-

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Models"); *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968) (per curiam) ("Mondo Freudo" and trailer for "Olga's Girls"); *Cain v. Kentucky*, 397 U.S. 319 (1970) (per curiam) ("I, a Woman"); *Bloss v. Michigan*, 29 L.Ed.2d 106 (May 3, 1971) ("A Woman's Urge").

ties with unbridled discretion to punish speech.

Even if a State may regulate the content of public displays visible to an unwilling audience of passersby, surely it may do so only by the enactment of a specific statute carefully drawn to deal with the matter sought to be proscribed. It has long been the rule that First Amendment rights may not be restricted by a statute, general and indefinite in its terms, which leaves a wide area of discretion to enforcement authorities. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968). In those cases where this Court has sanctioned limitations upon First Amendment rights on the basis of asserted invasions of privacy, it has done so only in the context of approving narrowly drawn statutes or ordinances designed to protect the asserted privacy interests while clearly informing the public of what is forbidden. See *Breard v. City of Alexandria*, 341 U.S. 622 (1951), cited by the Court on the privacy point in *Redrup* (ordinance regulating the solicitation of homeowners as to commercial materials); *Rowan v. United States*, 397 U.S. 728 (1970) (federal statute allowing recipient of certain types of material in the mail to have his name removed from mailing lists); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ordinance prohibiting the use of sound trucks which emit loud and raucous noises).[4]

Washington, however, has passed no statute at all di-

4. *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952), also cited by the court in *Redrup*, was a civil action, not involving a statute, in which the court held that a regulatory commission's order authorizing piped-in music in District of Columbia street cars did not violate the passengers' First Amendment rights. *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970), relied upon by the Washington Supreme Court, was also a civil action, involving a university's right to remove art displays from the corridor walls of the institution.

rected to the supposed harms described by its Supreme Court as justifying petitioner's conviction.

The standard set forth in *Roth* was carefully and precisely formulated; the Court recognized that only in this way can the obscenity standard have ascertainable meaning. *Roth v. United States*, 354 U.S. 476, 491 (1957). The Washington court has jettisoned this established meaning of obscenity and substituted one which is vague, overbroad and, indeed, incomprehensible.

The *Roth* standard requires that each motion picture be judged as a whole; a film cannot be suppressed merely because certain scenes are thought objectionable. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Trans-Lux Distributing Corp. v. Regents of the University of New York*, 380 U.S. 259 (1965) (*per curiam*). Abandoning that rule, the court below asserts that "individual portions or scenes . . . become a movie by themselves" as to passersby and others outside the theatre (A. 88). Washington would thus purport to test each individual "scene" for thematic content, offensiveness, and redeeming social value.

But what is a "scene"? Would a single image flashed on the screen for a few seconds constitute a "scene" for purposes of invoking criminal liability? In numerous films on Biblical themes, or on the nature of contemporary life, or on many other subjects, one could single out a small part and declare it—wrenched from its context and viewed without the accompanying sound track—to have a predominantly prurient appeal and to be devoid of redeeming social value. Should all such pictures be barred from the outdoor screens? If so, that would surely eliminate from this important medium of communication all films having

any erotic content whatever.[5] The exhibitor would have no way rationally to decide which pictures to exclude. The concept of an individual "scene" being "obscene," even though the film itself is not, would afford him no guidance, for it defies comprehension—and the predictable result would be that timidity and over-caution which so effectively chill expression. *Cf. Smith v. California*, 361 U.S. 147 (1959).

In effect, the Washington court has strained to reassert the outmoded "isolated passages" test of *Regina v. Hicklin*, (1868) LR 3 QB 360, a test which this Court said in *Roth* "must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U.S. at 489. And it has further fragmented the work by allowing isolated passages to be judged in terms of visual content alone while ignoring the components of sound and setting. Such censorship is manifestly destructive of First Amendment freedom and contrary to the narrow exception for unprotected speech delineated by *Roth* and subsequent cases.

The opinion below deals in fact not with obscenity at all, but rather with material considered to be "offensive," as is shown by its repeated use of pejorative words which fall short of expressing any legal standard. The justices state that they found the film "*personally* distasteful, offensive and devoid of social, philosophical or artistic merit" (A. 89, emphasis added). They cite "offensive expression" (A. 93) and "[t]he right of the homeowner to be free

5. It is well established that such content in works of art, literature, and science is constitutionally protected. As the Court observed in *Roth v. United States*, 354 U.S. 476, 487 (1957):

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

from the intrusion of unsolicited offensive displays . . ." (A. 95) to justify petitioner's conviction. Such words are standardless. They could be indiscriminately applied not only to meritorious films having erotic content, but to those containing scenes of warfare, civil strife, or whatever else a "homeowner" might find "offensive." The court concludes that "obtrusive displays" of "lewd and offensive films" are punishable under the statute (A. 96). Yet the latter phrase is nowhere defined.

These lapses into vagueness reveal that Washington's transformation of the obscenity statute would deprive the law of its ascertainable, constitutional meaning and engraft upon it a second standard of unconstitutional breadth and obscurity. The court below has employed the very type of vague, overbroad language which has been repeatedly stricken down where First Amendment rights are at stake.[6] It has also attempted, without benefit of legislation, to restore to RCW 9.68.010 pre-*Roth* language of an unconstitutionally sweeping and vague nature which

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6. E.g., *Holmby Prod., Inc. c. Vaughn*, 350 U.S. 870 (1955) (not "of a moral, educational or amusing character"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("cruel, obscene, indecent and immoral, or tend to debase or corrupt morals . . ."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacreligious"); *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965) and *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A.2d 751 (1965) ("dominant purpose or effect is erotic or pornographic, or if it portrays acts of sexual immorality, lust or lewedness, or if it expressly or implicitly presents such acts as desirable, acceptable or proper patterns of behavior"); *Kingsley Corp. v. Regents*, 360 U.S. 684 (1959) ("acts of sexual immorality . . . as desirable, acceptable, or proper patterns of behavior"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) ("sexual promiscuity . . . in such a manner as to be, in the judgment of the court, likely to incite or encourage delinquency or sexual promiscuity . . . etc.").

was removed from the statute by the 1961 state legislature.[7]

This Court has repeatedly made clear, both before and since the decision in *Redrup*, that general obscenity statutes may constitutionally be enforced only against materials which are obscene under the *Roth* test (see, *e.g.*, the cases cited *supra* at footnote 3). Yet the Washington Supreme Court here asserts that "the analysis of the trial court did not have to be guided solely by the *Roth* definition" (A. 88-89), since four decisions of this Court are said to have "inaugurated a 'contextual' approach to materials not strictly definable as obscene" (A. 91).

The cases cited are *Redrup, supra*; *A Book v. Attorney General*, 383 U.S. 413 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966); and *Mishkin v. New York*, 383 U.S. 502 (1966). None of those decisions, however, lends the slightest support to the notion that one who disseminates constitutionally protected material may be convicted under a general obscenity statute. In *Ginzburg* the defendant had virtually proclaimed the obscenity of the materials in the course of "commercial exploitation of erotica solely for the sake of prurient appeal." 383 U.S. at 465-66. Each publication "was originated or sold as stock in trade of the sordid business of pandering. . . ." 383 U.S. at 467. While holding that evidence of pandering is probative in close cases, the Court said:

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7. The current statute is set forth *supra*, p. 3. The predecessor statute, originally enacted in 1909, proscribed the dissemination of materials which were, *inter alia*, "indecent" or "immoral." See Revised Code of Washington Annoted, Ch. 9.68, pp. 153-4. The prior law was held unconstitutional for lack of a scienter requirement in *State ex rel. Lally v. Gump*, 356 P.2d 289 (Wash. 1960). The next session of the legislature enacted the present statute directed only to obscene materials.

"It is important to stress that this analysis simply elaborates the test by which the obscenity *vel non* of the material must be judged." 383 U.S. at 475.

Thus *Ginzburg* enunciated a rule of evidence, while preserving the requirement that the prosecution satisfy the *Roth* standards in order to convict.[8] Nor is any abandonment of the *Roth* test suggested by *Redrup's reversal* of three obscenity convictions. The Court's reference there to possible concerns over juveniles and assaults upon privacy, 386 U.S. 767, cannot fairly be read to imply that, having failed to legislate in the field, a State may indiscriminately wield its obscenity statute, destroying established standards in the process.[9]

In attempting to punish the showing of "offensive" films on drive-in screens by misapplying its obscenity law, Washington has violated the rule that a statute containing indefinite standards for the restriction of speech is invalid under the due process clause. The public must be fairly apprised of what is forbidden. In *Winters v. New York*, 333 U.S. 507 (1948), the Court said: "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." *Id.* at 515. And it is no answer that the meaning of a speech-restricting statute could be filled in by judicial

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8. The same is of course true of the companion case of *A Book v. Attorney General*, where the court reiterated and summarized the *Roth* requirements. 383 U.S. 413, 418 (1966).

9. *Cf. Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284 (1971), where the Court rejected privacy arguments advanced to support the conviction of one who wore an offensive sign on his jacket, noting that the statute involved evinced no concern with privacy "but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person.'" 29 L.Ed.2d at 292.

construction; such content cannot constitutionally be supplied by a series of criminal prosecutions. *Dombrowski v. Pfister*, 380 U.S. 479, 490-491 (1965).

II. THE CONVICTION OF PETITIONER FOR EXHIBITING A NON-OBSCENE MOTION PICTURE AT A DRIVE-IN THEATER IN A MANNER ALLEGED TO BE "OBTRUSIVE," WHERE THE STATE HAD ENACTED NO STATUTE DEFINING ANY SUCH CRIME, AND THERE WAS NO EVIDENCE THAT ANY NEARBY RESIDENT HAD COMPLAINED ABOUT THE FILM OR EVEN SEEN IT, DEPRIVES HIM OF DUE PROCESS OF LAW.

A further deprivation of due process is entailed in Washington's judicial extension of its obscenity statute to punish the exhibition of a non-obscene film on grounds of invasion of privacy.

The State has not enacted a statute of the "offensive display" type, although other jurisdictions have done so.[10] Nor, as the court itself points out, had Washington even recognized a common law right of privacy until the day of the instant decision (A. 95-96).

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10. *E.g.*, New York Penal Law §§245.10-245.11, Chapter 962, Laws of 1971, prohibiting the display of materials depicting nudity and sexual conduct "in such manner that the display is easily visible from or in any public street . . ." and containing detailed definitions of the terms "nudity" and 'sexual conduct;" and Arizona House Bill 301, approved May 10, 1971, prohibiting the public display of certain defined "explicit sexual material" in locations "easily visible from a public thoroughfare, from the property of others, or from commercial business premises generally open to minors at the time of such placing." In upholding the New York statute on November 9, 1971, the Criminal Court of New York County observed: "We are not dealing here with an obscenity statute. . . . The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct . . . It would be difficult to construct a statute less vague (than §§245.10-.11)." *People v. Lou Bern Broadway, Inc.*, unofficially reported at *New York Law Journal*, November 10, 1971, pp. 17-18.

The statute invoked against petitioner, RCW 9.68.010—passed in its present form in 1961, following the *Roth* decision—necessarily carried to petitioner and others a specific meaning: that criminal sanctions could follow from the dissemination, with knowledge of its contents, of a motion picture which was obscene when taken as a whole within the meaning of *Roth* and subsequent decisions.

The statute said nothing about proscribing individual scenes, and nothing about anyone's right to privacy.

The State's judicial pronouncements, moreover, had supported the protection of motion pictures under the freedom of speech guaranty, excepting those which were obscene. *Fine Arts Guild, Inc. v. Seattle*, 445 P.2d 602 (Wash., 1968).

Thus nothing in the statute or elsewhere gave petitioner notice that he could be prosecuted for exhibiting a non-obscene film at a drive-in the screen of which was visible from afar. The holding below that a property owner's right to be free of "offensive displays" is "obviously paramount" to the exhibitor's right of expression is not supported by any prior decision, nor had the State legislature expressed any such value judgment. Instead, the Washington court attempts to create a new common law crime. But it has failed to observe the rule that the definition of a crime may not be supplied judicially, in a defendant's own case, where prior fair notice was lacking. *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

Closely in point is the Court's recent reversal of a speech-punishment conviction in *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284 (1971):

> "In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested *must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.*" 29 L.Ed.2d at 290. (Emphasis added)

Cohen thus preserves, while the decision here below would forfeit, the basic due process rights of fair notice and hearing on a specified charge enunciated in *Cole v. Arkansas*, 333 U.S. 196 (1948). As the Court held in *Bouie v. Columbia*, 378 U.S. 347 (1964):

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language *but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.* As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.'" *Id.* at 352. (Emphasis added)

Moreover, Washington has undertaken this remarkable *ex post facto* extension of its obscenity statute on the basis of a factual record which falls far short of showing the "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling

individual to avoid exposure to it" mentioned in *Redrup, supra,* 386 U.S. at 769.

The court's opinion eliminates the presence of juveniles voluntarily watching the film through the fence as a basis for affirmance, on the ground that the state had not yet passed a statute specifically directed to juveniles[11] (A. 96-99). (It is not explained why the absence of a statute should not be equally fatal to the invasion-of-privacy argument.) The opinion also appears to eliminate the privacy of passing motorists as a ground of decision, since they would obtain only short glimpses of the screen (A. 95). Thus the decision rests solely upon the supposed privacy interests of householders having the screen in sight (A. 95-96).

Yet the occupants of houses in the vicinity would obviously have but a silent view of a distant screen, and would watch the images thereon, beyond an occasional glimpse, only to the extent that they chose to do so. Totally absent here is the kind of inescapable intrusion involved in such cases as *Breard v. City of Alexandria* and *Kovacs v. Cooper, supra.* And paradoxically, under the court's "individual scenes" concept of obscenity, the householder who took time to watch the *entire film* through his window would presumably restore the work to constitutional protection.

Here, the record shows no complaints about the film from householders or anyone else. There is no evidence that anyone from a nearby house even saw any part of the picture. The required "showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen v. California,* 403 U.S. 15 (1971), is miss-

11. It has since done so, RCW 9.68.060.

ing. Petitioner's conviction rests upon the assumption that someone in a neighboring house might have seen the film, and *might* have felt his privacy invaded by it. But here, as in *Cohen v. California, supra,*

> ". . . the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." 29 L.Ed.2d at 291.

The foregoing infirmity in the opinion below is recognized by Justices Finley and Neill, who concur in the result.[12] They conclude that the majority's rationale is in error because:

> "Decisions of the federal courts in the area here involved seem to me to indicate that the First Amendment rights cannot be circumscribed absent clear proof of an *actual assault* upon the rights of a non-consenting individual." (A. 103; emphasis in original.)

The deprivation of due process is thus exacerbated by the utter absence of proof of a necessary element of the supposed crime. *Thompson v. City of Louisville,* 362 U.S. 199 (1960).

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12. The concurrence is on the ground of alleged "pandering" within the meaning of *Ginzburg v. United States,* 383 U.S. 463 (1966). That view, not shared by the majority below, is insupportable because (a) the film does not present a "close case" as to obscenity, and (b) there is no evidence whatever of record concerning its advertising or promotion.

III. THE STATE'S SEIZURE OF A MOTION PICTURE UNDER A WARRANT ISSUED SOLELY ON THE TESTIMONY OF A POLICE OFFICER WHO HAD SEEN LESS THAN ALL OF THE FILM, WHERE NO PRE-SEIZURE ADVERSARY HEARING WAS HELD, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The Washington Supreme Court held that the *ex parte* hearing which the justice of the peace conducted prior to issuing an arrest warrant satisfied the requirements established by this Court for the seizure of allegedly obscene materials. That hearing consisted entirely of testimony by one police officer who had never seen the entire motion picture and who was unable to testify regarding the thematic content of the film because he viewed it from outside the theatre grounds and did not hear the sound track. The officer's testimony accordingly was limited to a verbal description of isolated scenes (A. 8).

The justice of the peace issued the warrant solely upon the basis of this testimony; he did not view the film himself. In fact, the magistrate failed even to issue a *search* warrant which described in detail the film to be seized, as required by the Fourth Amendment, *Marron v. U.S.*, 275 U.S. 192 (1927). Rather, he merely issued a warrant for the arrest of "John Doe," and left it to the officers to carry it out and to seize the motion picture.[13]

In *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961), this Court held that the First and Fourteenth

13. Use of this procedure is alone sufficient to invalidate the seizure of the film. As this Court emphasized in *Stanford v. Texas*, 379 U.S. 476, 485 (1945):

> ". . . [T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."

Amendments require that a magistrate utilize a "procedure . . . designed to focus searchingly on the question of obscenity" before he issues a warrant for the seizure of allegedly obscene publications. A procedure in which the magistrate relied upon the conclusory affidavits of a police officer, without inspecting the materials himself, was there held insufficient. Three years later, in *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), a magistrate had conducted a forty-five minute *ex parte* hearing in which he examined seven books offered as examples of thirty-one paperback novels sought to be seized and destroyed. Although the magistrate had reviewed some of the materials, the Court held that *Marcus's* requirement of a searching inquiry into the question of obscenity can be fulfilled only by affording an opportunity for a pre-seizure *adversary* hearing:

> "A seizure of all copies of the named titles is indeed more repressive than an injunction preventing further sale of the books . . . . [T]he Constitution requires a procedure 'designed to focus searchingly on the question of obscenity,' *Marcus*, 367 U.S. p. 372, 6 L.Ed.2d 1136. We therefore conclude that in not affording [the bookstore operator] an adversary hearing, the procedure leading to the seizure order was constitutionally deficient . . . .
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> "Nor is the order under review saved because, after all 1,715 copies were seized and removed from circulation, [the bookstore operator] was afforded a full hearing on the question of obscenity. *For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public to unobstructed circulation of nonobscene books.*" *Id.* at 210-11, 212-13; (Emphasis added).

The same standard of a searching inquiry has been held applicable in the case of an evidentiary seizure of a motion

picture film, although the Court has not yet been required to decide whether the standard invariably calls for a pre-seizure adversary hearing in such cases. *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

Six federal circuits have considered the question and have concluded that the danger of inhibiting access to non-obscene written materials which required an advisory hearing in *A Quantity of Books, supra*, is equally compelling in the case of seizure of a motion picture film. *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1969); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), *reversed on other grounds*, 28 L.Ed.2d 528 (1971); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293 (2d Cir. 1970); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F.2d 687 (3d Cir. 1969).

The present record is striking evidence that only an adversary procedure can ensure that the magistrate's attention will be directed to the relevant legal principles, and that he will not issue a warrant without consideration of its impact upon protected speech. Even by *ex parte* standards, the procedure followed here was deficient. The magistrate employed only the Fourth Amendment "probable cause" test (A. 13-14), which necessarily falls short of the First Amendment requirement. See *Merritt v. Lewis*, 309 F. Supp. 1249, 1251 (E.D. Cal. 1970). And at the very least, a hearing cannot constitute a "searching inquiry" unless testimony is received from one who has seen, and heard, the entire motion picture, or unless the magistrate himself views the film before issuing the warrant. *Marcus v. Property Search Warrant*, 367 U.S. 717, 731-32 (1961).

The Washington Supreme Court held that *Marcus* and *A Quantity of Books* require a pre-seizure adversary hearing only where, as in those cases, a warrant is sought for the seizure of large numbers of publications in the course of civil proceedings looking toward their destruction. The court reasoned that the seizure of "Carmen Baby" for use as evidence in petitioner's criminal prosecution involved only a "temporary" restraint of a single motion picture film and that the length and scope of the restraint imposed by the seizure, and the danger that nonobscene items would be seized, were therefore considerably less than in *Marcus* and *A Quantity of Books*.

But Washington has vastly underestimated the extent to which the arrest of a film exhibitor and evidentiary seizure of his film can restrain the exercise of First Amendment rights. Characterization of such a seizure as "temporary" ignores the fact that criminal prosecutions may involve restraints on dissemination for periods of time substantially beyond the maximum period of restraint considered constitutionally permissible in other contexts. *United States v. Thirty-Seven Photographs*, 28 L.Ed.2d 831 (1971).

For example, here more than six months elapsed between the seizure and petitioner's trial *de novo* in Superior Court, and more than a year between the seizure and the trial court's entry of findings and judgment. During all of that time the film was impounded and its exhibition prevented —a far longer period than the seventy-four day maximum set by the Court in *Thirty-Seven Photographs, supra* (Tr. 10). Yet the Superior Court, and later the Washington Supreme Court, held in effect that "Carmen Baby" *was* capable of lawful dissemination to the public (for exam-

ple, in an indoor theatre or an outdoor theatre enclosed by an opaque fence). Thus the lack of any adequate pre-seizure hearing effectively contributed to the suppression of an non-obscene film for a period of a year at the trial court level—precisely the danger which caused this Court to require a pre-seizure adversary hearing in *A Quantity of Books v. Kansas*, 378 U.S. 205, 211 (1964).

Furthermore, it is incorrect to assume, as the Washington court has done, that the scope of the suppression is small when only a single copy of a film is seized. A film such as "Carmen Baby" which is held for public exhibition, unlike a single book, is directed at all those who would be in the audience—not at a single purchaser:

> "Preventing this number of persons from viewing a film is certainly equivalent to seizing all copies of a book from the newsdealers involved in *A Quantity of Books;* in the functional terms we must use to balance the interest in suppressing obscenity against that of ensuring distribution of non-obscene views, the restraint here and in *Bethview* is, if anything, more substantial than the seizure of less than 200 books." *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 295 (2d Cir. 1970).

Even assuming that the exhibitor could obtain another film print—which is unlikely in a small city such as Richland, Washington—the fact of his previous arrest would certainly deter him, and other exhibitors in the area, from obtaining and showing another print until the final judicial determination of its protected character. Arrest and seizure therefore equal complete suppression. "Functionally an arrest resembles a non-judicially imposed injunction against certain conduct. . . ." H. Monaghan, *First Amendment Due Process*, 83 Harv.L.Rev. 518 (1970).

Seizure without an adversary hearing—which readily results, as it did here, in de facto censorship for months on end—is a classic example of the kind of excessive regulatory technique which was emphatically rejected in *Butler v. Michigan*, 352 U.S. 380 (1957).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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